No. 18-266

In The
Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Production of oil in United States waters began in 1894 from piers in the Santa Barbara Channel with the first offshore platform constructed in 1932 off the coast of California. After World War II, offshore drilling and production grew exponentially with tens of thousands of wells drilled in the waters of over seventy countries.[2]

Founded in 1940, the International Association of Drilling Contractors (IADC) is a non-profit member association dedicated to improving safety and advancing drilling technology in the upstream petroleum industry. At the core of IADC's mission is an imperative to promote the highest standards of stewardship in industry safety standards, environmental integrity, and operational efficiency. As part of that mission, the IADC strives for reasonable regulation and legislation governing the work of its members.

The oil and gas industry provides the fuel that powers the world economy. Despite its name, the IADC includes more than just drilling contractors (companies who own and operate land or offshore drillings

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

[2] David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977).

rigs). Its members also include operators and producers (companies engaged in exploring for and producing oil and natural gas) and other companies associated with the production of oil and gas (including service companies, equipment manufactures, and consultants). The IADC is committed to promoting responsible operations by fostering industry best practices that mitigate negative impact and maximize the benefits of drilling to the betterment of its workers, the economy, and the country.

The U.S. is currently the world's top producer of oil and natural gas.[3] This domestic oil and gas production enables our energy independence by lessening our reliance on foreign oil and gas, particularly during periods of increased tensions in international trade. The United States spends $81 billion a year to protect global oil supplies and provide continuous fuel to American gas stations.[4] In 2001, President George W. Bush, while discussing the importance of diversifying the country's energy supplies for national security, stated that an overdependence on any source of energy from a foreign source, "leaves [the United States] vulnerable to price shocks, supply interruptions, and in

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[3] U.S. Energy Information Administration, Today In Energy, *United States Remains the World's Top Producer of Petroleum and Natural Gas Hydrocarbons*, May 21, 2018, https://www.eia.gov/todayinenergy/detail.php?id=36292.

[4] Tom DiChristoper, *US Spends $81 Billion a Year to Protect Global Oil Supplies, Report Estimates*, CNBC, Sept. 21, 2018, https://www.cnbc.com/2018/09/21/us-spends-81-billion-a-year-to-protect-oil-supplies-report-estimates.html.

the worst case, blackmail."[5] More than a decade later, in 2012, President Barack Obama stated that the Department of Defense was the world's largest consumer of energy[6] for fueling military vehicles, ships, and planes.[7] The Department of Defense itself recognizes:

> Energy is a fundamental enabler of military capability, and the ability of the United States to project and sustain the power necessary for defense depends on the assured delivery of this energy. It must be available at home and abroad, over great distances, through adverse weather, and across air, land, and sea, often against determined adversaries.[8]

In 2017, Reuters reported that while the use of oil for the U.S. military declined by 20% from 2007 to 2015, the decline was due to the decrease in combat operations rather than a rising efficiency and use of renewable energy.[9] Although the effort of policymakers

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[5] George W. Bush, President, Remarks by the President to Capital City Partnership (May 17, 2001), *available at* https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010517-2.html.

[6] Barack Obama, President, Remarks by the President in the State of the Union Address (Jan. 24, 2012), *available at* https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

[7] William Joyce, *Oil Dependency: a Subtle but Serious Threat*, American Security Project (June 4, 2013), https://www.americansecurityproject.org/oil-dependency-a-subtle-but-serious-threat/.

[8] Department of Defense, *2016 Operational Energy Strategy*, https://www.acq.osd.mil/eie/OE/OE_library.html.

[9] Timothy Gardner, *U.S. Military Marches Forward On Green Energy, Despite Trump*, Reuters (Mar. 1, 2017), https://www.reuters.

to move towards green energy is commendable, fuels produced by the oil and gas industry continue to power the national defense interests of the United States.

This record production of oil and gas also improves our economy in a number of ways. Production at home allows for export and sale of U.S. hydrocarbons abroad. It provides millions of jobs for American workers.[10] In addition, federal and state governments receive substantial revenue from the leasing of offshore lands for oil and gas development.

Offshore production in federal waters of the Gulf of Mexico alone accounts for 18% of total U.S. crude oil production.[11] In 2017, over 600 million barrels of oil and over one billion mcf of natural gas were produced in the Gulf of Mexico.[12] The producing companies paid the federal government more than $3.7 billion in royalties, rents, bonuses, and other fees in order to produce this oil and gas.[13] In turn, the federal government

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com/article/us-usa-military-green-energy-insight/u-s-military-marches-forward-on-green-energy-despite-trump-idUSKBN1683BL.

[10] PWC, *Impacts of the Oil and Natural Gas Industry on the US Economy in 2015*, July 2017, at E1, https://www.api.org/news-policy-and-issues/american-jobs/economic-impacts-of-oil-and-natural-gas (last visited Jan. 24, 2019) (finding that in 2015, over ten million U.S. jobs were supported by natural gas and oil).

[11] U.S. Energy Information Administration, Gulf of Mexico Fact Sheet, July 17, 2018, https://www.eia.gov/special/gulf_of_mexico/data.php.

[12] U.S. Department of the Interior, National Resources Revenue Data, Gulf of Mexico, https://revenuedata.doi.gov/explore/offshore-gulf/ (last visited Jan. 21, 2019).

[13] *Id.*

paid a portion of these revenues to states adjacent to the Gulf of Mexico.[14]

The importance of the offshore oil and gas industry in the U.S. was further highlighted in 2014 when oil prices collapsed. The downturn resulted in a loss of more than 160,000 jobs and bankrupted a number of offshore drilling companies.[15] Further, the active rig count (another market indicator) plummeted as drillers took their rigs out of service.[16]

Members of the IADC employ offshore oil and gas workers who make up a specialized subset of Jones Act seamen. Although some offshore workers in the energy sector work on installations permanently affixed to the ocean floor, many work on specialized floating structures considered vessels under the general maritime law. These specialized vessels may include drill ships, semi-submersibles, jackup rigs, and drilling barges (collectively referred to as mobile offshore drilling

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[14] 43 U.S.C. § 1337(g)(2).

[15] Clifford Krauss, *Falling Oil Prices May Make Trump Happy but They Pose Risks for U.S.*, N.Y. Times, Nov. 29, 2018, at B1, *available at* https://www.nytimes.com/2018/11/29/business/prices-trump.html. Law firm Haynes and Boone, LLP keeps a comprehensive list of North American oil and gas producers who have filed for bankruptcy since the beginning of 2015. Haynes & Boone, LLP Oil Patch Bankruptcy Monitor, Jan. 7, 2019, http://www.haynesboone.com/Publications/energy-bankruptcy-monitors-and-surveys. The list has reached 167. *Id.* at pp. 7–11.

[16] Baker Hughes' North America Rig Count, Jan. 18, 2019, http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reportsother (Excel spreadsheet entitled "North America Rotary Rig Count (Jan 2000—Current)," tab entitled "Gulf of Mexico Split").

units or MODUs). These vessels are generally contracted by operators for multi-million to multi-billion dollar offshore oil and gas projects. IADC members are involved in the ownership, operation, maintenance, and regulatory compliance attendant to these MODUs.

Workers on these offshore drilling rigs are highly trained, well-compensated specialists who regularly deal with operational and environmental hazards that traditional seamen never encounter. Before a MODU begins drilling, the vessel must "rig up" with extraordinarily large and heavy equipment such as a lower marine riser package that allows deepwater drilling operations to proceed safely in compliance with regulatory and industry standards. Workers on the drill floor must keep downhole pressures under control through the use of complex equipment such as blowout preventers, hydraulic actuators, and chemically weighted drilling fluids introduced into the wellbore by high pressure pumps. Drilling operations involve heavy drill pipe and casing that is lifted above the drill floor and then lowered to drill wells up to 35,000 feet into the earth.[17] In addition to valuable hydrocarbons, deepwater oil and gas wells may also contain toxic gases such as hydrogen sulfide and carbon dioxide. Further, these drilling, completion, and workover operations occur around the clock in all manner of weather

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[17] Blade Energy Partners, *Applied Advancements in Technologies that Continue Increasing Wells' Safety, Environmental Protection & Operations Across the Upstream Life Cycle* 15 (Aug. 29, 2018), https://www.blade-energy.com/applied-advancements-in-technologies/.

conditions and sea states.[18] Even NASA has studied deepwater drilling for insight relative to safe operations in a hostile work environment.[19]

While a traditional seaman may face normal risks arising from the operation of a traditional ship at sea (operating the vessel equipment in a dynamic environment under adverse weather and sea conditions), offshore oil and gas workers working aboard MODUs face those and many more non-traditional risks. As one commentator put it: "The perils peculiar to the drilling industry are compounded by all the dangers of the sea."[20] These vessel-based oil and gas workers may face the traditional perils of the sea, but they also contend with hazards associated with drilling thousands of feet into the earth from a MODU located thousands of feet above the sea floor. They are extensively trained and must comply with safety and environmental regulations specific to the offshore oil and gas industry, in addition to the traditional regulatory regimen encountered when conducting vessel operations at sea.

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[18] *See generally* William L. Leffler et al., *Deepwater Petroleum Exploration & Production: A Nontechnical Guide* (PennWell 2003).

[19] APPEL News Staff, *Academy Case Study: The Deepwater Horizon Accident Lessons for NASA*, 4.3 Academy Case Study (May 10, 2011), *available at* https://appel.nasa.gov/2011/05/11/aa_4-4_acs_deepwater_horizon_lessons-html/.

[20] David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977).

The IADC is deeply concerned about the effect the decision below could have on the upstream petroleum industry and its special subset of seamen.

SUMMARY OF THE ARGUMENT

Rigorous and protective compensation schemes for seamen already exist. Congress occupies those waters and has determined that punitive damages are not part of that arrangement. Nevertheless, as a practical matter, this rigorous compensation scheme does have a deterrent effect in its present form that compels safe operations—without punitive damages. Congress has *not* ignored the need for deterrence and punishment of unsafe actors in the offshore oilfield. It has set a course that occupies those waters by virtue of its creation of numerous federal agencies, statutes, and rules regulating the operations of IADC members. Even if the Court were to determine that the addition of punitive damages to the existing seaman's compensatory scheme would provide additional deterrence or benefit to seamen, it could take no such path. The course it would seek to sail would lead it to waters already occupied by Congress in the areas of both compensation and deterrence. Allowing punitive damages as contemplated by the Ninth Circuit would affect IADC members by having a detrimental impact on uniformity in worker claims, settlement and trial of such claims, contractual obligations and insurance coverage in the

offshore oilfield, as well as negatively impacting the economy and consumers in general.

ARGUMENT

I. IADC MEMBERS ARE ALREADY DETERRED FROM RECKLESSLY DISREGARDING SAFETY

A. Effective Deterrence by Multiple Regulators

The purpose of punitive damages is not to compensate one for loss, but to punish and deter bad conduct. *See, e.g.*, *Restatement (Second) of Torts* § 908 (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); *Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others. . . ."). Conversely, the purpose of unseaworthiness and Jones Act remedies afforded seamen is not to punish or deter shipowners, but to compensate seamen for injury or death. Congress' purpose in enacting FELA and incorporating it into the Jones Act was to provide monetary compensation to seamen who suffer injury or death. *See, e.g.*, *St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 657–58 (1915) (recovery under FELA is "confined to . . . loss and

suffering").[21] Indeed, whether a seaman sues for Jones Act negligence or unseaworthiness, "he is entitled to but one indemnity by way of compensatory damages." *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928).

Rather than promoting deterrence through its compensation scheme, Congress has acted via its regulatory agencies. It created the U.S. Coast Guard (USCG) and charged it with, among other things, promulgating and enforcing regulations "for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2 (setting out the primary duties of the USCG). This includes the training and licensing of merchant seamen, inspection and certification of vessels, and promulgation and enforcement of the regulations necessary to carry out the mandate assigned to it by Congress. *See generally* 46 U.S.C. §§ 2101 to 14702 ("Vessels and Seamen").

Congress likewise created the U.S. Maritime Administration (MARAD) whose duties include regulation of ships, shipping, ship building, vessel operations, safety, and national security.[22] MARAD's mission is to

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[21] *See also Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65, 69–71 (1913) (FELA provides right to "recover[ ] such damages as would . . . compensate[ ]" for loss); *Gulf, Colo., & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175 (1913) (recovery under FELA "must . . . be limited to compensating those . . . as are shown to have sustained some pecuniary loss"); *American R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913) ("The damage [under FELA] is limited strictly to the financial loss thus sustained.").

[22] MARAD, About Us, Nov. 13, 2018, https://www.maritime.dot.gov/about-us.

"foster, promote, and develop the merchant marine industry of the United States." 49 U.S.C. § 109(a) (setting out the organization and mission of MARAD). It is specifically charged with training vessel officers and maintaining a strong and modern merchant marine. 49 C.F.R. § 1.92 (setting out the responsibilities of MARAD).

Similarly, Congress has created agencies charged with regulating the oil and gas industry with a similar mandate to punish and deter unsafe conduct. In addition to the USCG and MARAD, offshore oil and gas producers are also subject to the rules and regulations of the Bureau of Safety and Environmental Enforcement (BSEE).[23] Indeed, drilling contractors labor under significantly greater regulatory requirements than traditional vessel owners.

Following the 2010 *Deepwater Horizon* Disaster in the Gulf of Mexico, the President assembled the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, which released a comprehensive report in January 2011. The Commission concluded:

> Deepwater energy exploration and production, particularly at the frontiers of experience, involve risks for which neither industry

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[23] In 1953, Congress enacted the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356a, and authorized the Secretary of the Interior to, among other things, regulate oil and gas production on the Outer Continental Shelf (OCS). The Secretary of the Interior delegated this regulation to BSEE. 30 C.F.R. § 250.101.

> nor government has been adequately prepared, but for which they can and must be prepared in the future.
>
> . . .
>
> Fundamental reform will be needed in both the structure of those in charge of regulatory oversight and their internal decisionmaking process to ensure their political autonomy, technical expertise, and their full consideration of environmental protection concerns.
>
> Because regulatory oversight alone will not be sufficient to ensure adequate safety, the oil and gas industry will need to take its own, unilateral steps to increase dramatically safety throughout the industry, including self-policing mechanisms that supplement governmental enforcement.[24]

After initial regulatory changes following the *Deepwater Horizon* incident, the federal government ultimately established BSEE. BSEE has created a series of comprehensive regulatory programs focused on operational safety and environmental protection relative to offshore oil and gas activities.

For example, BSEE requires that all operators have a Safety and Environmental Management Systems (SEMS) program subject to third-party audits. 30 C.F.R. §§ 250.1900 to 250.1933. This promotes safety

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[24] Nat'l Comm'n on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* vii (Jan. 2011), https://www.govinfo.gov/app/details/GPO-OILCOMMISSION/summary.

by ensuring that all personnel aboard an offshore vessel are complying with the policies and procedures identified in the operator's SEMS program. *Id.* at § 250.1901. Under the SEMS rule, operators must implement a training program so that all of their employees and contractors are trained to work safely. *Id.* at § 250.1915. SEMS requires operators to evaluate their drilling contractor's safety and environmental performance and ensure that the contractors have their own safe work practices. *Id.* at § 250.1914. Further, operators and contractors must create a written agreement on appropriate contractor safety and environmental practices prior to the start of work on the operator's project. *Id.* at § 250.1914.

The SEMS program empowers all personnel aboard the vessel who witness an imminent risk or dangerous activity to stop work. *Id.* at § 250.1930. The SEMS rule also requires an "employee participation plan" that promotes a participatory environment where all offshore industry employees may eliminate or mitigate safety hazards. *Id.* at § 250.1932. It also established guidelines for reporting unsafe conditions and violations of regulatory requirements. *Id.* at § 250.1933. Since the *Deepwater Horizon* tragedy, BSEE's requirements for SEMS programs have evolved as it has identified additional ways to manage operational safety hazards.

Another regulatory development under BSEE's watch is the blowout preventer and well-control

requirements. *Id.* at § 250.724.[25] These rules address highly complex offshore drilling operations and reduce technical and operational failures that could have catastrophic results.[26] BSEE recently revised these rules to keep up with industry developments, including real-time well-control monitoring using independent, automatic, and continuous monitoring systems capable of recording and transmitting data from well control systems and blowout preventers.[27]

BSEE also has a number of options when seeking to ensure an operator's compliance with its regulatory programs, including the assessment of civil penalties, as well as referrals for criminal penalties.[28] BSEE may issue Incidents of Non Compliance (INCs) which "underscore the importance of safe operations" and assist BSEE in conducting annual performance reviews of

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[25] *See also* 81 Fed. Reg. 25,888 (April 29, 2016) (codified at 30 C.F.R. § 250, subparts D, G); 83 Fed. Reg. 22,128 (May 11, 2018) (to be codified at 30 C.F.R. § 250, subparts D, E, F, G, Q).

[26] Statement of Brian Salerno, Director of BSEE, before the Committee on Natural Resources Subcommittee on Energy and Mineral Resources, U.S. House of Representatives, March 2, 2016, https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104578.

[27] John M. Cushing, Jr., *The Real Deal on Remote Real-Time Monitoring*, July 29, 2016, https://www.bsee.gov/blog-post/the-real-deal-on-remote-real-time-monitoring.

[28] Although many of BSEE's regulations impact all personnel working aboard MODUs on the OCS, BSEE's authority to assess civil penalties appears limited to operators. *Island Operating Co. v. Jewell*, No. 6:16-cv-00145, 2016 WL 7436665, at *8 (W.D. La. 2016). Likewise, contractors are not subject to criminal liability for their alleged violations of OCSLA. *U.S. v. Moss*, 872 F.3d 304, 304 (5th Cir. 2017).

each operator to addresses safety concerns.[29] In 2019, the maximum civil penalty increased to $43,576 per violation. 30 C.F.R. § 250.1403. BSEE recognizes that "[t]he adjustment of the maximum civil penalty amount is intended to maintain the ***deterrent effect*** of such penalties and promote compliance with the law."[30] Although these fines are directed at the operator, the fines also deter drillers and other service contractors from lapses in safety standards by way of "top down" enforcement. Since BSEE's creation in 2011, offshore injuries and fatalities have shown a general decline.[31]

The USCG also enforces regulations specific to MODU owners and operators. 33 C.F.R. § 140.101 (inspections of MODUs); 46 C.F.R. § 15.520 (MODU crewing requirements). Through formal memorandums of understanding and agreement, BSEE and the USCG have allocated the regulation of MODUs and offshore energy activities.[32] For instance, both BSEE and the USCG have the right to board MODUs for inspections. The USCG inspections address issues related to safe

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[29] U.S. Department of the Interior, Budget Justifications and Performance Information, Fiscal Year 2018, Bureau of Safety and Environmental Enforcement 42, https://www.doi.gov/bpp/budget-justifications (FY 2018 BSEE).

[30] BSEE OCS Civil Penalty Program Policy and Procedures Guidebook, Sept. 2013, at p. 17, https://www.governmentattic.org/22docs/BSEE-OCScivilPenPgmProcedGuidbk_2013.pdf (emphasis added).

[31] BSEE, Offshore Incident Statistics, https://www.bsee.gov/stats-facts/offshore-incident-statistics (last visited Jan. 26, 2019).

[32] BSEE, Interagency Collaboration, https://www.bsee.gov/newsroom/partnerships/interagency (last visited Jan. 24, 2019).

operations of MODUs, credentials of offshore installation managers, and various navigation-related personnel. BSEE and the USCG have entered into various Memoranda of Agreements related to pollution prevention and response, civil penalties, SEMS, and MODUs.

In summary, the offshore seaman and the oil and gas vessel owner are subject to comprehensive regulations to promote safety at sea. Far from ignoring the safety and health of seamen, Congress has acted to create protective measures to deter and punish wrongdoers in the interest of seamen's safety. Allowing punitive damages in a seaman's personal injury suit is not only contrary to Congressional intent and judicial interpretation that the Jones Act and unseaworthiness remedies are compensatory, but it intrudes on another area already occupied by Congress through its creation of federal agencies to constantly deter bad behavior and punish wrongdoers.

B. Contractual Obligations in the Offshore Energy Industry Deter Unsafe Conduct

Offshore drilling contractors and service companies frequently enter into reciprocal contractual defense and indemnity obligations with their oil company customers. These agreements obligate each party to assume liability for injury claims made by the party's own employees.

In the context of offshore drilling operations, the drilling contractor employs most offshore workers on a MODU, whereas the customer, or operator, generally

has far fewer employees on location. When a drilling contractor's employee is injured, it is not uncommon for the employee to file suit against the drilling contractor (maintenance and cure, Jones Act negligence, and unseaworthiness) and the operator (negligence). Even where the operator has allegedly contributed to the employee's injury, most contracts require the drilling contractor to indemnify the operator.[33]

Thus, from a contractual risk allocation perspective, the drilling contractor generally bears greater legal and financial responsibility for injury to its seamen working offshore. These contractual obligations serve to deter a MODU owner from engaging in unsafe conduct that could injure seamen.

In addition, the contractual risk allocation practices that support these vast and expensive drilling projects which benefit society will be made more difficult to plan should the punitive damages allowed by the Ninth Circuit be sanctioned by the Court. While a drilling contract may address defense and indemnity obligations, the marine insurance contracts which provide coverages for these critical obligations, may or

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[33] Michael A. Golemi & William W. Pugh, *Hoping for the Best, Preparing for the Best: "Don't Worry, We Have Indemnity,"* The Advocate, Spring 2017, at 47–49, *available at* https://www.liskow.com/portalresource/HopingfortheBest_PreparingfortheWorst/; *Julia M. Adams & Karen K. Milhollin, Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 Tul. Mar. L.J. 43, 48 (2002).

may not insure the punitive damage obligations of the indemnitee.[34]

C. The Existing Compensatory Scheme Provided to Seamen by the Jones Act and Unseaworthiness Remedies Sufficiently Deters Unsafe Conduct

The compensatory protection afforded seamen is substantial and well-recognized. As Professor Schoenbaum notes:

> [A] seaman who suffers injury or death in the service of a ship has three important remedies against his employer: (1) maintenance and cure; (2) a cause of action for unseaworthiness of the vessel; and (3) a cause of action for negligence under the Jones Act. *All three remedies are unique to seamen; no other worker in our society can invoke such powerful relief in the event of an industrial accident.*

Thomas J. Schoenbaum, *Admiralty and Maritime Law* at 240 (5th ed. West 2012) (emphasis added). IADC members are subject to this variety of specialty seamen's claims further discussed below.

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[34] *Julia M. Adams & Karen K. Milhollin, Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 Tul. Mar. L.J. 43, 101 (2002) ("Quite often, the marine insurance contract will be controlled by law entirely different from the indemnity contract. Therefore, even if the indemnity is valid and enforceable, it may not be covered under the insurance, and therefore be of little practical use to the indemnitee."). For further discussion of the effect on insurance coverage, *see* section II(C), *infra*.

A seaman is entitled to receive maintenance and cure from his employer if he becomes ill or is injured while in the service of the vessel. *See Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). Maintenance and cure is a no fault remedy that provides medical care and living expenses to ill or injured seamen. *Warren v. United States*, 340 U.S. 523, 528 (1951).

A seaman is also entitled to assert Jones Act negligence against his employer. So while the workers' compensation laws of many states bar negligence suits for compensatory damages by an injured employee against his or her employer (*see, e.g.*, Tex. Lab. Code § 408.001(a)), the seaman retains both his workers' compensation-like no fault remedy of maintenance and cure, as well as his right to sue his employer for negligence. In addition, a seaman's standard of causation on this negligence claim is "featherweight." *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). A seaman need only show that his employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957).

Lastly, a seaman may also maintain a cause of action for breach of the warranty of seaworthiness against the owner of the vessel. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). The warranty of seaworthiness imposes a nondelegable duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Id.* at 550. It is absolute, and failure to

supply a safe ship results in liability "irrespective of fault and irrespective of the intervening negligence of crew members." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990). No amount of due diligence may serve as a defense to this absolute warranty. *Clevenger v. Star Fish & Oyster Co.*, 325 F.2d 397, 400 (5th Cir. 1963) ("neither ignorance nor due diligence will serve as an adequate defense").

Not only does a seaman have these three distinct causes of action, but he is entitled to pursue these claims in state or federal court. The "saving to suitors" clause in the Judiciary Act of 1789 allows most maritime suits to be filed in state court, even though they are governed by substantive maritime law. Judiciary Act of 1789, 1 Stat. 76, s. 9 (1789).

Courts treat seamen differently in other ways, as well. For instance, a seaman's own contributory negligence will not bar his recovery. *See Boudreaux v. U.S.*, 280 F.3d 461, 466 (5th Cir. 2002); *Miles v. Melrose*, 882 F.2d 976, 984 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

Additionally, seamen's releases are subject to careful scrutiny: "One who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247–48 (1942) (quoting *Harmon v. United States*, 59 F.2d 372, 373 (5th Cir. 1932)). The shipowner must show that the seaman's release "was executed

freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." *Id.* at 248.

The Federal Arbitration Act provides further protection to seamen by prohibiting arbitration clauses in seamen's employment contracts. 9 U.S.C. § 2.

Another safeguard afforded seamen is the Seaman's Protection Act. It prohibits employers from retaliating against seamen for engaging in certain protected activities related to compliance with maritime safety laws and regulations. 46 U.S.C. § 2114. Examples include protection from retaliation for reporting the violation of a safety regulation to the USCG and refusing to perform an ordered duty because of apprehension of serious injury. *Id.* at § 2114(a)(1)(A), (B). For such a violation, *Congress has determined*[35] that a seaman may recover compensatory damages, as well as punitive damages not to exceed $250,000. *Id.* at § 2114(b); 49 U.S.C. § 31105(b)(3).

These unique protections afforded to seamen sufficiently deter vessel owners from allowing unsafe practices on their vessels. When all of these exposures are aggregated, it is apparent that no additional protections are needed by way of altering Congress' compensatory framework in order to deter bad behavior. Judicial attempts at altering the compensatory framework of Congress have sometimes been questioned by

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[35] Tellingly, had it so desired, Congress could have afforded seamen punitive damages in personal injury and death claims as well.

commentators and the courts themselves. Professor Robinson has noted: "Since the oil industry went offshore, the legal system has struggled to produce a body of injury law that is rational, fair, internally consistent, and acceptably productive of safety incentives. The result has been chaos."[36]

II. ALLOWING PUNITIVE DAMAGES IN UNSEAWORTHINESS CLAIMS WILL CREATE INDUSTRY-ALTERING IMPACTS

Exposure to punitive damages arising from unseaworthiness claims would create an inordinate burden on members of the IADC.

A. Allowing Punitive Damages Would Create Abuses of the Process

Since this Court sanctioned punitive damages for the arbitrary and capricious denial of maintenance and cure in *Atlantic Sounding Co. v. Townsend*, seamen's lawsuits routinely include such claims. 557 U.S.

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[36] David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977). *See also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (where in discussing conflicting judicial interpretations of who is a "seaman," Justice O'Connor wrote: "our wayward case law has led the lower courts to a 'myriad of standards and lack of uniformity in administering the elements of seaman status.'") (quoting Engerrand & Bale, *Seaman Status Reconsidered*, 24 S. Tex. L.J. 431, 494 (1983)). The Court also cited a Seventh Circuit seaman status case which noted: "We have made a labyrinth and got lost in it. We must find our way out." *Id.* (citing *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

404, 424 (2009). If this Court affirms the Ninth Circuit's decision below, we would expect to see the same effect with regard to pleadings for punitive damages based on unseaworthiness. Predicting a jury's finding as to such damages, however, is nigh impossible:

> The borderline between willful and wanton injury and injury as the result of simple negligence, is often a hairline distinction. The sufferer gains little solace from the doubtful and unpredictable uncertainty of judges and juries as they undertake to place the conduct of the wrongdoer in the categories of willful, intentional, wanton, gross, reckless, or other categories of negligence.

Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432, 444 (5th Cir. 1962) (Gewin, J., specially concurring). The Court has recognized the "stark unpredictability" of such awards and noted that "the spread between high and low individual awards is unacceptable." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494–501 (2008).

Facing the specter of punitive damages judgments, some defendants will feel forced to settle for amounts higher than the estimated range of actual damages suffered by the seaman. Others will resist settlement when faced with a settlement demand so unreasonable that there seems to be no other alternative but trial on the merits. Prolonging litigation does nothing to promote justice.[37] It also does nothing to further the

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[37] Public policy wisely encourages settlements. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *see also Airline Stewards and Stewardesses Ass'n v. American Airlines, Inc.*, 573 F.2d 960,

interests of both Congress and the courts to ensure fair compensation for injured seamen.

B. Disparate Treatment of Employers and Vessel Owners

A seaman's liability claims, Jones Act negligence and unseaworthiness, are unique in that they typically arise from the same set of liability facts, yet a seaman may not receive cumulative damages. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928) ("[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong . . . for which he is entitled to but one indemnity by way of compensatory damages."). Should this Court, however, make punitive damages available via one path (unseaworthiness against the vessel owner), but not the other (negligence against the employer), seamen and their attorneys will most certainly proceed more often, and more vigorously, against the vessel owner. The obligation of seaworthiness is peculiarly and exclusively that of the owner or operator. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 100 (1946). In the offshore oil and gas industry, where the seaman's employer is often different

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963 (7th Cir. 1978), cert. denied, 439 U.S. 876 (1979) ("The law generally favors and encourages settlements."). The courts favor settlement as such is indicative that both parties have been satisfied.

than the vessel owner, the vessel owner (typically the drilling contractor) will be disparately impacted.

In addition, IADC members who are Jones Act employers and vessel owners are already further exposed to claims for negligence *per se* and unseaworthiness *per se*. Both Jones Act negligence and unseaworthiness can be the *per se* result of a regulatory violation.[38] Each new regulation promulgated by BSEE adds to the seaman's arsenal to make such claims. Although the defense of comparative negligence is generally available to a vessel owner against a claim of unseaworthiness, that defense disappears if a seaman is injured as a result of a defendant's violation of a safety regulation.[39] IADC members will thus shoulder a disproportionate share of unseaworthiness claims.

C. The Lack of, or Cost of, Available Insurance Coverage for Punitive Damages Is a Significant Burden

Similar to the existence of contractual indemnities in the offshore energy sector, the availability and cost of insurance coverage for seamen's claims is a significant burden on offshore drilling and service companies. Some insurers, although willing to insure a punitive damages award, will charge a hefty price for such

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[38] *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 160–62 (5th Cir. 1985).

[39] *MacDonald v. Kahikolu Ltd.*, 442 F.3d 1199, 1202 (9th Cir. 2006); *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514, 517 (9th Cir. 1996); *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037, 1041 (5th Cir. 1985).

coverage. State laws, however, impact whether such coverage is even available in certain jurisdictions. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 335 (1955) (holding that state law, rather that federal admiralty law, should govern marine insurance contracts). Many states, including California where the underlying injury occurred, do not sanction insurance coverage for punitive damages awards.[40] The unavailability of insurance for punitive damages, as well as the inability to benefit from such insurance where it is available, will negatively impact the industry when it comes to long-term planning for potential liabilities.

D. Economic Impacts

The need to protect the safety of seamen is great, but so is the need to protect domestic production of oil. The offshore energy industry is already burdened with the volatility of oil and gas prices due to production abroad. In addition, the cost to comply with the many regulations applicable to oil and gas vessels is great. If workers are allowed to enhance their traditional seamen's remedies with punitive damages, IADC members will be vulnerable to large judgments which could severely impact a company's bottom line. More money will be diverted to protecting the company's legal interests, rather than in funding new projects.

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[40] Wilson Elser, Punitive Damages Review, 2014 ed., https://www.wilsonelser.com/news_and_insights/legal_analysis.

Ultimately, the consumer will be affected at the gas pump.

CONCLUSION

In *The Genesee Chief*, 53 U.S. 433, 459–60 (1851), the Court long ago decided the maritime law was subject to regulation by Congress and its power to change it will "hardly be questioned." Later, as noted by the *McBride* majority, the Court summarized: "[It] must now be accepted as settled doctrine that . . . Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382, 385 (5th Cir. 2014) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917)). The Court should decline Respondent's invitation to sail into waters already occupied by Congress. For the reasons stated above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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